

LITIGATORS CORNER:

My Wishes for 2007 – Part 2



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In February of this year, I wrote the first part of what I promised would be a two-part column: *My Wishes for 2007*. My wishes then were: (1) let's junk the Schlieffen plans; (2) there should be fewer, not more, summary judgments; (3) stop the search for the damned holy grail of legal perfection; (4) make the lawyers learn the facts early; (5) use effective mediators; (6) skip free-standing *Markman* hearings; and (7) use more contingent fee litigation.

When I wrote about using effective mediators (wish #5), I was referring admiringly to those mediators who are "head knockers," who almost force the two parties to see reason. I pointed out that I am a big believer in mediation – if you use a "head knocker."

But there is also another aspect to my wish for effective mediation:

(1) Judges should be willing to order mediation. We recently had a negative experience here in the Northern District of Illinois. I had tried to persuade the other side to mediate. The damages are relatively small, and the parties are not far apart. The defendants won't mediate. I even offered to reduce our settlement demand if they would agree to mediate before an excellent mediator, one I refer to as a "head

knocker," and if they would agree to do so at his earliest available opportunity. They still refused. So finally, I moved to compel mediation, citing several cases from other courts that had ordered parties to mediate. Some of those courts had, in fact, gotten rather irritated with parties because they had failed to mediate, as ordered. As in our case, these were all district courts. I described the circumstances to our court, telling it that I had tried everything I could in terms of persuasion and inducement, and that all that was left was mediation. The judge said he agreed with everything I said, but he wouldn't order mediation because he wasn't certain he had the power to do so. Even if he did have that power, he said he didn't want to use it.

Judges should know that they DO have the power to order mediation, and they should use it. At least, they should tell the parties that they must make a stab at it. A good mediation is worthwhile. Clients have to attend, so lawyers can't filter what's going on in order to keep their clients from hearing unpleasant news, such as a mediator's skeptical view of the client's case. If you have a client that persists in taking too rosy a view of the chances of success, the reaction of a neutral third party may be a good thing for him or her to hear. Last of all, good mediators have good track records, so there will be an increased chance of a positive outcome to your case.

(2) Trim back the use of experts. I have written several articles about experts, most of them critical. For instance, as far back as June, 1999, I wrote *Experts: A Benefit or Mutually Assured Destruction*. After many years of experience as an intellectual property litigation attorney, I simply don't trust most experts. In fact, I consider most of them to be a rung lower than hired guns. An expert can be found to state just about any point of view. They are frequently biased, and they can inflate the expense of almost any lawsuit. Even though they don't work on a contingent fee basis – it is considered unethical for them to do so – they are solidly aware of the fact that, if the side for which they testify wins, they will be

used again and again. It's like a perpetual gravy train.

(3) Let's have less hysterical and more knowledgeable media reporting on intellectual property issues. I have written several articles in which I gave examples of publications, including legal publications, whose writers didn't seem to have a grasp of the intricacies involved with intellectual property law, or with complicated legal cases, in general. For instance, in *The Patent Reform Act and Inequitable Conduct* (March, 2006), I wrote about how an innocent plaintiff can be convicted by negative pre-trial publicity; and in *Hysteria Lane* (July, 2006), I wrote about how the media distorted the very high profile Blackberry case, *NTP Inc. v. Research in Motion*.

But some of the worst examples of media distortion in intellectual property law have occurred in media coverage of the so-called "patent troll" issue. The media routinely (and erroneously) confuses independent inventors, who often don't produce their inventions because of lack of resources, with companies that are set up solely for the purpose of buying patents from inventors, then accusing large companies of infringing these patents, and finally, forcing the big companies to take licenses for these patents.

In some of my past columns, I have also pointed out that several universities (such as Stanford), and corporations (such as IBM), often make money from patents they themselves don't enforce, just like the so-called "trolls" – the independent inventors who (according to both large corporations and the media) do the same thing. Please see *Patent Trolls – Or Not?* (February, 2006); *Stanford University – A Patent Troll?* (April, 2006); and *Is IBM a Patent Troll?* (May, 2006).

(4) Stop using Powerpoint presentations. Before writing about this wish, I must admit that our firm, like so many other law firms, has used Powerpoint presentations in court. I have admitted to this in previous articles: most notably, in *How to Make Effective Use of a Mediation* (May, 2003). Our attorneys have also used Powerpoints when giving presentations before legal groups. I, myself, have used them.

But this doesn't mean that Powerpoints are overall a good thing. In fact, I think they can cramp thinking and destroy the power of a speaker to persuade. *The New Yorker*

magazine published a very insightful article (May 28, 2001) about the downside of Powerpoint presentations, entitled *Absolute Powerpoint: Can a Software Package Edit Our Thoughts?*. In this article, writer Ian Parker calls Powerpoint “software you impose on other people,” and says that it turns “middle managers into bullet-point dandies.” But, most serious, says Parker, is the fact that

Powerpoint also has a private, interior influence. It edits ideas. It is, almost surreptitiously, a business manual as well as a business suit, with an opinion – an oddly pedantic, prescriptive opinion – about the way we should think. It helps you make a case, but it also makes its own case: about how to organize information, how much information to organize, how to look at the world. One feature of this is the AutoContent Wizard, which supplies templates – “Managing Organizational Change” or “Communicating Bad News,” say – that are so close to finished presentations you barely need to do more than add your company logo. . .

In other words, Powerpoints can severely curtail creativity and originality.

I have seen Powerpoints have a deleterious effect on all sorts of presentations, including those made in court. In one of our recent cases, the other side used a Powerpoint presentation at a claim construction hearing. They used 80-90 slides. They didn't get to the construction of the claims until slide #59. It was numbing.

There is a tendency for Powerpoint presentations to become more important than the speaker, or even the ideas being presented. Instead of looking at you (the attorney or speaker), the audience or jury starts looking at the Powerpoint. Then you start to look at the Powerpoint. Then everybody's looking at the Powerpoint. Finally, before you know it, you're all reading the Powerpoint. I have often thought that, in many cases, the lawyer (or speaker) might just as well mail in the darned Powerpoint and not show up at all! That's how much Powerpoints can overtake situations.

Powerpoint presentations might be all right if, made lazy by this software, we didn't almost put the entire presentation on the slides. A few slides, with snappy graphics, would be fine for emphasis, when some-

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thing really important is being said. But, is everything so important that it must be put on a slide? How many presentations have you gone to, either in or out of court, where there were scores of Powerpoint slides? This can become, as I have said, numbing.

Another problem: the person giving the talk often uses Powerpoint slides clumsily. The junior lawyer puts together the presentation, but the senior lawyer uses it. And the senior lawyer often has no clue of how to go from slide to slide. Then, thoroughly confused, he starts going back and forth, trying to find his place in his talk. When this happens in court, this confusion with the order of the slides can end up making the lawyer's fancy evidence seem more confused – and confusing – as well.

Many lawyers who use these presentations, but did not create them, change their minds a lot. So, if you are the lawyer who is putting together the presentation, you don't know which slides will be used until the last minute. You get tied up in making and revising charts and charts and charts, Powerpoints and Powerpoints and

Powerpoints. Winston Churchill didn't use a Powerpoint.

I think the main point here is that how effectively you give a speech or address a jury should be how you get their attention. Too often, the slides just get in the way. They are a “third party.” You and your audience both end up reading the slides.

As a final note on Powerpoint slides, I turned to one of the top online bloggers, Seth Godin, and found a wonderful example of a slide that shows why Powerpoints can be so troublesome. Mr. Godin calls it the “worst Powerpoint slide ever used by a CEO.” This slide was not able to be reproduced clearly here, but if you check it out at http://sethgodin.typepad.com/seths_blog/2007/04/worst_powerpoint.html, I think you will agree that it is comparable in its complexity to some of the worst slides ever used by a lawyer!

These are some more of my wishes for 2007. I hope that at least some of them will come to pass – and in the very near future. But if they don't, at least I have gotten them off my chest. **IPT**